IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
V.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S POSITION ON COMPETENCY
AND DEFENDANT'S SELF-REPRESENTATION

The Court now has an ample record on which to find the defendant is competent to waive counsel and elect to represent himself. There is no need for the defendant to be transferred for further psychiatric testing or observation and the Court should not do so. Accordingly, the United States respectfully requests that the Court find the defendant competent within the meaning of 18 U.S.C. § 4241 and then conduct an extensive Faretta hearing during which the Court can decide whether the defendant knowingly and voluntarily waives his right to be represented by counsel.

Background

The defendant was indicted on December 11, 2001. The indictment charges six terrorism-related crimes, and the indictment alleges, inter alia, that Moussaoui took flight training at Airman Flight School in Norman, Oklahoma, where he flew for over 50 hours in a single-engine aircraft before moving to Minnesota to take flight simulator training for Boeing 747s.

The defendant was arraigned on January 2, 2002. Defense counsel apparently met with the defendant and spoke with him over the phone many times between December and April

22, 2002.

On April 22, 2002, at a hearing scheduled to address a defense motion regarding certain conditions of Mr. Moussaoui's confinement, the defendant asked to be heard and recited a nearly 50-minute argument to the Court asking that his current counsel be fired and that he be permitted to hire different counsel or represent himself.

The Court engaged in a lengthy colloquy with the defendant during the April 22 hearing, and the Court observed that the defendant appeared intelligent, to understand what he was doing, and that he understood the judicial system. Apparently motivated by an abundance of caution rather than some manifestation by the defendant of some mental defect, the Court appointed a psychiatrist, Dr. Raymond Patterson, to evaluate the defendant to ensure that he was competent to waive his right to counsel.

After the April 22 hearing, the defendant began filing *pro se* motions. All tolled, the defendant has filed a number of *pro se* motions and letters to the Court, including six that were provided to the Government.

Up until the time Dr. Patterson filed his report on May 23, 2002, the defendant had refused to be interviewed or otherwise tested by Dr. Patterson. According to Dr. Patterson, defendant has indicated that he does not wish to talk to Americans, including an American doctor, or to psychiatrists.

In writing his report, Dr. Patterson considered documents filed in this case, including *pro se* pleadings by the defendant, the transcript of the defendant's statements during the April 22, 2002, hearing, and records from prisons where the defendant has been held, including two videos showing extractions of the defendant from cells by correctional officials.

Dr. Patterson also interviewed staff from the Alexandria Detention Center ("ADC") who have had daily contact with the defendant.

On June 4, 2002, two psychologists hired by defense counsel filed a written opinion, much of which has been kept from the Government.

On June 7, 2002, Dr. Patterson filed a supplemental report, in which he described at length a recent, two-hour interview with the defendant. In his supplemental report, Dr. Patterson opined that Mr. Moussaoui is not suffering from a mental disease or defect such that he is incompetent to waive counsel.[1]

Argument

I. There is Sufficient Evidence Demonstrating Defendant Is Competent To Waive his Right to Counsel

A. There is No Need for a Competency Hearing

The Court has before it an ample record on which to find the defendant competent, and the Court should do so. In fact, there is no evidence in the record to suggest that the defendant falls short of the definition of competence set forth in 18 U.S.C. § 4241. Dr. Patterson's reports and the defendant's conduct, statements, and writings, all plainly establish the defendant's competence. Accordingly, the Court need not hold a competency hearing. Any additional colloquy the Court feels it needs with the defendant to bolster its observations that the defendant understands the nature and consequences of the proceedings against him and can assist in his defense could be made part of the Faretta hearing we suggest.

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1. This memorandum was largely written before we received Dr. Patterson's supplemental report. With that report, the Court has an even more ample record on which to find the defendant competent.

The standard for competency to stand trial is the same as the standard for competency to waive counsel: "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and [has] 'a rational as well as factual understanding of the proceedings against him.'" Godinez v. Moran, 509 U.S. 389, 396 (1993)(quoting Dusky v. United States, 362 U.S. 402 (1960)). A hearing to determine such competency may be ordered "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a).

Thus, a full competency determination is necessary only when a court has reason to doubt a defendant's competency. Godinez v. Moran, 509 U.S. at 401 n. 13; United States v. Kirsh, 54 F.3d 1062, 1070 (2d Cir. 1995) (district court must hold competency hearing only if there is reasonable cause to believe that the defendant is incompetent within the meaning of 18 U.S.C. § 4241(a)). It is within a court's discretion to determine whether such cause exists. United States v. Sovie, 122 F.3d 122, 128 (2d Cir. 1997) (citing United States v. Vamos, 797 F.2d 1146, 1150 (2d Cir. 1986)).

A court can make a determination on competency without a hearing. See, e.g., United States v. Morrison, 153 F.3d 34, 47 (2d Cir. 1998) (district court's determination that defendant was competent without a hearing did not render that determination defective); United States v. Pryor, 960 F.2d 1, 2 (1st Cir. 1992); Wise v. Bowersox, 136 F.3d 1197, 1202 (8th Cir. 1998).

In deciding whether there is reasonable cause to believe that the defendant is

incompetent a court can rely on several factors: "In determining whether a full hearing on competency is required, a trial court considers evidence of a defendant's irrational behavior, his courtroom demeanor, and any medical opinion bearing on competency." Bryson v. Ward, 187 F.3d 1193, 1201 (10th Cir. 1999), cert. denied, 529 U.S. 1058 (2000).

Perhaps the most important of these factors is a court's own observation of a defendant, on which a court may rely in finding a defendant competent. See Bryson v. Ward, 187 F.3d at 1201; Sovie, 122 F.3d at 128 (district court denied defense motion for mental health examination and found defendant competent after observing that defendant was a participant in his defense, including taking notes and conversing with counsel); Pryor, 960 F.2d at 2 (affirming conviction without competency hearing where "the court had seen defendant vigorously, and rationally, participating in his own defense."); Wise v. Bowersox, 136 F.3d 1197, 1202-03 (8th Cir. 1998) (court found defendant competent and permitted him to represent himself after observing defendant during "three or four" various motions hearings). A court may rely on its own questioning of the defendant and weigh the defendant's "clarity, responsiveness, coherence, and corresponding demeanor." Streetman v. Lynaugh, 835 F.2d 1521, 1526 n. 13 (5th Cir. 1988).

Here, the Court has had several opportunities to observe the defendant in court, including the lengthy session on April 22 during which the defendant spoke to and with the Court for approximately 50 minutes. During the April 22 hearing, the Court repeatedly observed that the defendant appeared to be highly intelligent, to know what he was doing and where he was, and to understand the American criminal justice system. The defendant knew his role and the roles of others in the criminal justice system and the Court perceived the defendant as able to communicate.

The Court's observations of the defendant alone are sufficient to establish his competency. A court has wide discretion in finding that a defendant is competent based on observations of the defendant at hearings. United States v. West, 877 F.2d 281, 285 n. 1 (4th Cir. 1989) ("The district court, having observed and talked with [the defendant] at numerous prior hearings, found no reasonable cause to believe he was unfit to stand trial . . . Such a determination is within the trial court's discretion . . . ."); Kirsh, 54 F.3d at 1070 ("court's view of the defendant's competency based on its observations at trial is entitled to deference"). Likewise, it is well settled that courts can routinely find defendants competent to plead guilty or stand trial based on observations made in such in-court colloquies. See, e.g., Beck v. Angelone, 261 F.3d 377, 388 (4th Cir. 2001) (plea colloquy showed defendant competent).

Next, although the observations and concerns of defense counsel about their clients are a factor to be considered in deciding whether to hold a competency hearing, concerns of defense counsel alone are not enough to require a competency hearing or establish doubt of a defendant's competence. Reynolds v. Norris, 86 F.3d 796, 800 (8th Cir. 1996); Bryson v. Ward, 187 F.3d at 1202. Here, defense counsel never raised the issue of competency until the defendant voiced his desire to fire them on April 22.

Accordingly, the Court need not hold a competency hearing in this case given the lack of reasonable cause that defendant is not competent. Should the Court want an additional opportunity to observe the defendant, we believe the extensive colloquy that we propose for a Faretta hearing would amply satisfy the Court that the defendant is able to understand the nature and consequences of the proceedings against him and to assist in his defense.

B. There is No Evidence that Moussaoui is Suffering from a Mental Disease or Defect

Rendering him Incompetent to Stand Trial or Waive Counsel

Based on the record in this case, there is no evidence -- and certainly no reasonable cause to believe -- that the defendant is not competent. Put simply, the standard for competence either to stand trial or waive counsel is a low one and the defendant clearly exceeds it. In short, the defendant's in-court address on April 22, his *pro se* filings, and the reports issued by Dr. Patterson, including Dr. Patterson's observations and the observations of the defendant conveyed by staff members at the Alexandria Detention Center, clearly show that the defendant is competent.

The defendant understands the judicial process and the role he, the Court, the prosecutors, and his counsel, play in that process. He clearly understands the charges against him and he has publicly stated his intent to fight those charges. His in-court statements, his *pro se* filings, and his position, though misguided, are based on logic and on his world view.

At the April 22 hearing, the defendant spoke in a lucid and rational manner. He provided reasons for his desire to hire different counsel or to represent himself, even citing case law[2] to support accurately recited propositions.[3] The Court apparently was impressed by the defendant's abilities to reason and communicate his points and the Court commented that "as

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2. The defendant cited Washington v. Texas for the proposition that "the right to present a defense is a fundamental element of due process of law." April 22 Tr. at 26.

3. The defendant even indicated on April 22 that he anticipated that the Court would order a mental health examination but that he would not "entertain any discussion with people who advance theories" based on "the Freudian theory of psychiatry." April 22 Tr. at 20.

The defendant also moved in writing to sever his relationship with his appointed attorneys.

intelligent as you are, and you're obviously a very smart man, and you're able to read American law books and glean from them some of the rulings, . . ." April 22 Tr. at 47. The Court also noted: "I will say that from what I've seen in court today, you appear to know and understand what you're doing." April 22 Tr. at 48. Further, the defendant mentioned in court on April 22 that he was considering waiving a jury. On the jury waiver issue, the defendant demonstrated not only awareness of the process and the issue, but also that his analysis is sophisticated: The defendant indicated that he had read the trial transcript from the African embassy bombings case in the Southern District of New York and had decided that one of the prosecution strategies was to bombard and confuse the jury with a large amount of information. April 22 Tr. at 59. To avoid this, the defendant stated that he is considering waiving a jury because a judge would be able to see through such a prosecution strategy.

Second, the defendant's *pro se* writings are rational. For example, the defendant has moved in writing to recuse the Court and he provided specific reasons, citing the prior working relationship between the Court and one of the defense lawyers. Likewise, the defendant moved to change the venue of the case to Colorado, again providing some logical support.[4] (In addition, defendant has filed other *pro se* motions which have not been provided to the Government.)

Thus, defendant has set forth his positions, both orally and in writing, seeking strategic advantages based on articulated reasons. Such ability to participate in court proceedings can be taken as a sign of competency. United States v. Leggett, 162 F.3d 237, 242 (3d Cir.

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4. The defendant's motion to change venue also included his motion to reduce the over-representation of government employees in the jury pool.

1998).

Next, Dr. Patterson's reports clearly indicate there is no evidence to suggest that the defendant is suffering from a mental disease or defect. Dr. Patterson's supplemental report describes his two-hour interview with the defendant and sets forth his diagnosis that the defendant "does not appear to have an Axis I diagnosis of major mental disease or defect."[5](June 7, 2002 Rpt. at 8). Dr. Patterson opinies that "to a reasonable degree of medical certainty, [defendant] knowingly and voluntarily waives his right to counsel, and such waiver is not a product of mental illness." June 7 Rpt. at 10. Dr. Patterson painstakingly sets forth the sources he considered in writing his initial report to the Court.[6] Although careful to point out that he cannot make a full report because the defendant refused to participate in an interview or psychological testing, Dr. Patterson concludes, that (based on his review of documentary materials including the defendant's writings and statements in court, on his personal observations and on his interviews with ADC staff), the defendant does not appear to have symptoms or a history of a mental disease or defect that would render him incompetent. Dr. Patterson notes that the defendant's refusal to cooperate with a psychiatric evaluation or to work with his court-appointed attorneys are based on his belief that he is defending himself against America, his sworn enemy.

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5. Dr. Patterson diagnoses the defendant as "no diagnosis" for Axis I, meaning that Moussaoui has no chemical disorder that would interfere with his ability to waive counsel, and an Axis V assessment of 70, which means that the defendant is functioning well mentally. See DSM-IV at 25-26, 30-31.

6. Dr. Patterson lists 59 documents or electronic media, his four attempts to interview the defendant, and his interviews of five ADC personnel.

Long-term observations of Moussaoui suggest that he is competent. As set forth in Dr. Patterson's reports, the very experienced staff at the Alexandria Detention Center have observed the defendant for months. The observations of the ADC staff show that the defendant is oriented to time and place and rational in his beliefs. None of the staff believes the defendant to be mentally ill or deficient.

Indeed, the defense psychologists' primary quibble with the ADC staff seems to be the defense contention that because the food Moussaoui hoarded had spoiled, his stated reasons for keeping it must be wrong and he therefore must be suffering from a mental defect. That position seems preposterous. Otherwise, the defense psychologists point out that Captain Mitchell observed that "everything is a plot with him"[7] (Def. Psych. Rpt. at 9), that the defendant appears to pray out loud (Id.), and that Lt. Davis acknowledged that a person can be mentally ill without presenting a management problem. Id. This is hardly a "compelling and reasonable basis" to believe that the defendant is suffering from a mental disease or defect.

Although it is difficult for the Government to discern because much of it is redacted, the defense psychologists' position is unavailing. First, Dr. Patterson's supplemental report provides an opinion and diagnosis based on an interview with the defendant, and the defense psychologists never had access to the defendant. Second, Dr. Patterson's supplemental report restates the criticisms voiced by the defense psychologists.

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7. It is, of course, hardly a surprise that the defendant believes that the U.S. is out to get him. He is charged with being a terrorist, sworn to exact holy war against America, who is now incarcerated – by his sworn enemy – in a U.S. jail, with U.S. appointed lawyers, U.S. prosecutors, set to be judged by a U.S. Judge and jury. His view on this point is not irrational, and is cited by Dr. Patterson as Mr. Moussaoui's stated political reason not to talk to his lawyers or an American mental health professional.

In their report, the hired defense psychologists first enumerate largely the same evidence listed by Dr. Patterson.[8] They then add three observations recounted by ADC staff and give their opinion on Moussaoui's writings. After taking Dr. Patterson to task for voicing an opinion on the defendant's mental health, the defense psychologists then opine "to a reasonable degree of professional certainty that . . . there is a compelling and reasonable basis for continuing concern that Mr. Moussaoui's decision to waive his right to counsel may be the product of a mental disease or defect . . . ." Def. Psych. Rpt. at 15. Curious among the defense psychologists' observations is their comparison of "his pre-April 22 writings" to his "recent productions." Def. Psych. Rpt. at 11. As far as we can tell from the redacted report we received,[9] the defense psychologists' list of the "sources of information" they considered in writing their opinion sets forth no pre-April 22 writings by the defendant. [10]

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8. The defense psychologists note that they consulted with Tarik Hamdi. This consultation should be viewed with great skepticism given Hamdi's established links to Usama Bin Laden and other members of *al Qaeda*. For example, Hamdi is known to have a close association with Khalid al-Fawwaz, who has been indicted in the Southern District of New York for his role in the Bin Laden-led conspiracies to murder U.S. nationals and to bomb U.S. government facilities. Al-Fawwaz is awaiting extradition to the United States, having exhausted his direct appeals of the decision ordering him to be extradited to the United States. Moreover, evidence presented at the trial before Judge Sand last year revealed that Hamdi, purporting to accompany media representatives conducting an interview of Bin Laden, traveled to Afghanistan and personally delivered some accessories to the satellite telephone used by *al Qaeda* headquarters personnel in Afghanistan just three months before the bombings of the U.S. embassies in East Africa.

9. There are 12 sources of information redacted from the report provided to the Government. The reason that these sources were redacted seems improper; it is unlikely that a general description of such sources (e.g., the date on which the source was produced) would disclose any attorney-client information.

10. Further, even if the defendant actually did exhibit some change in his writing from before April 22, 2002, it is extremely unlikely that he suddenly became mentally ill around

Moreover, the defendant's conduct the last year suggests that he is competent. Among other activities, it seems undisputed that the defendant spent several months at the Airman Flight School in Norman, Oklahoma, where he logged over 50 hours of flight time on single-engine aircraft. Then, in August 2001, the defendant traveled from Oklahoma to Minnesota, where he was instructed on a Boeing 747-400 simulator. At no time during this flight training, was it suggested that the defendant might be mentally deficient.

Finally, the defendant's desire to fire his lawyers and his refusal to submit to Dr. Patterson's exam are logically explained by his anti-American views. His actions and attitudes are not the product of mental illness but are based on his view of the world. He is a fanatic – a jihadist – but he is not mentally incompetent to stand trial or waive his right to counsel.

Defendant's professed desire to take the ill-advised course of firing skilled counsel and representing himself does not suggest that he is mentally incompetent. And, such an argument, taken to its logical conclusion, would mean that any criminal defendant who made an ill-advised strategic decision would be presumed to be incompetent. Such a result would gut the right to represent oneself. Nearly every criminal defendant who chooses to represent himself is committing a self-destructive act. Such a self-destructive act does not, however, signify a decision based on mental illness, or a paranoid belief system, or on some other indicator of incompetence. See Wise v. Bowersox, 136 F.3d at 1202 ("[A] poor defense theory alone does

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that date. Moreover, such onset of mental illness would have been observed by the many ADC officials who were interviewed by Dr. Patterson and the defense psychologists, and no such decline was noted. In fact, according to the recounted interviews with ADC officials, the defendant's behavior and interaction seems to have improved over time, as, for example, the food hoarding seems to have abated.

not prove that a defendant should not have been allowed to waive the right to counsel.").

A court can accept a defendant's decision to waive counsel, no matter how ill-advised, without a competency hearing, (See, e.g., Wise v. Bowersox, 136 F.3d at 1202) just as, for instance, courts may accept defendants' decisions to withdraw habeas motions in death sentence cases without an inquiry into the competence of those defendants, See Hammet v. Texas, 448 U.S. 725 (1980) (Court allowed *pro se* withdrawal of a certiorari petition filed by a death-sentenced prisoner with no inquiry into competence), or permit defendants to refuse to allow their counsel to pursue tactics such as accepting a plea offer that would have reaped a benefit without a competency hearing. See Autry v. McKaskle, 727 F.2d 358, 362 (5th Cir. 1984).

C. Defendant May be Competent But Not Permitted to Represent Himself

Having found defendant competent, the Court should, of course, then hold a Faretta hearing to determine whether the defendant knowingly and voluntarily waives his right to counsel. Although mindful not to violate defendant's right to represent himself, the Court has discretion to deny defendant's motion to represent himself if he is doing so to manipulate the judicial system or if he is vacillating between representing himself and being represented by counsel.

As discussed more fully below, the right to self-representation is not absolute, and the default position is that a criminal defendant is represented by counsel. United States v. Frazier-El, 204 F.3d 553, 559 (4th Cir.) (quoting Martinez v. Court of Appeal of Calif., 528 U.S. 152, 120 S.Ct. 684, 691 (2000)) ("[T]he Faretta right to self-representation is not absolute, and 'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs

the defendant's interest in acting as his own lawyer.'"); cert. denied, 531 U.S. 994 (2000) United States v. Singleton, 107 F.3d at 1096 (4th Cir. 1997) (citing Faretta, 422 U.S. 834 n. 46) (the right to self-representation could be subjugated if the defendant engaged in obstructionist conduct).

Thus, if Moussaoui is being obstructionist -- e.g., refusing to speak with Dr. Patterson -- to manipulate the system, or if such obstreperous behavior is evidence of vacillation on exercising his right to represent himself, then the Court should not grant his request. Frazier-El, 204 F.3d at 558.

For the same reason, the Court should not order the defendant to be sent to FCI Butner nor other BOP facility for further evaluation and observation. Such an order would reward the defendant, and would allow him to manipulate the judicial system.

II. The Right To Self-Representation

A. Applicable Law

1. Right to Self-Representation

The Sixth Amendment requires that counsel be provided for a defendant who cannot afford to retain private representation in any case in which he will be incarcerated if convicted. See Scott v. Illinois, 440 U.S. 367 (1979); see also Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932) (applying right to capital cases). The defendant may waive his right to counsel if the waiver is knowing, intelligent and voluntary. See Brady v. United States, 397 U.S. 742 (1970); Johnson v. Zerbst, 304 U.S. 458, 468 (1938); Frazier-El, 204 F.3d at 558; Singleton, 107 F.3d at 1095.

The Sixth Amendment implicitly provides an affirmative right to self-representation. See Faretta v. Califomia, 422 U.S. 806 (1975). This right extends to capital

cases. Silagy v. Peters, 905 F.2d 986, 1007 (7th Cir. 1990) ("The court in Faretta did not impose any restrictions upon a defendant's right to refuse the assistance of counsel except to state that the right must be 'knowingly and intelligently' waived. Moreover, we can think of no principled reason to deny a death-eligible defendant his Faretta right to proceed without the assistance of counsel. If an individual in a capital sentencing hearing wishes to proceed *pro se*, Faretta grants him the right to do so."). The right to self-representation must be preserved even if the trial court believes that the defendant will benefit from the advice of counsel. See McKaskle v. Wiggins, 465 U.S. 168 (1984); see also United States v. Davis, 285 F.3d 378, 383 (5th Cir. 2002) (rejecting appointment of "independent counsel" to present mitigating evidence capital case against express wishes of defendant) . To preserve both the right to counsel and the right to self-representation, the trial court must proceed with care in evaluating a defendant's expressed desire to forgo the representation of counsel and conduct his own defense. See Singleton, 107 F.3d at 1096 (explaining that right to self-representation and to representation by counsel, while independent, are essentially inverse aspects of the Sixth Amendment and that assertion of one constitutes de facto waiver of other). However, "where . . . a conflict erupts between the right to counsel and the right to proceed *pro se*, a court should not be criticized for favoring the former right: the consequences of being deprived of counsel are far more serious than of not being allowed to proceed uncounselled." United States v. Tuitt, 822 F.2d 166, 179 (1st Cir. 1987).

"Because of the legal preeminence of the right to representation by counsel and the need to maintain judicial order," Singleton, 107 F.3d at 1096, the Fourth Circuit has held that to be effective, "[a]n assertion of the right of self-representation ... must be (1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." Frazier-El, 204 F.3d at 558

(internal citations omitted).[11] To ensure that the defendant's waiver is knowing, intelligent and voluntary, courts must inquire into the defendant's understanding of the Sixth Amendment waiver and his awareness of the disadvantages of self-representation. See Patterson v. Illinois, 487 U.S. 285, 299 (1988); see, e.g., Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998) (court should conduct on-the-record discussion to ensure that defendant was aware of risks and ramification of self-representation); and United States v. Silkwood, 893 F.2d 245, 248 (10th Cir. 1989) (court's inquiry must be a penetrating and comprehensive examination into nature of charges, statutory offenses, range of allowable punishments, possible defenses, circumstances in mitigation, and all other facts essential to broad understanding of whole matter). Although the Fourth Circuit has not mandated that trial courts conduct formal inquiries into a defendant's understanding of self-representation, it has advised that it would be preferable for courts to explore "the defendant's background capabilities and understanding of the dangers and disadvantages of self-representation." Singleton, 107 F.3d at 1097-98.

However, a defendant's otherwise valid invocation of his right to self-representation should not be denied because of limitations in the defendant's education, legal

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11. The requirement that the request be clear and unequivocal is to protect against the inadvertent waiver of the right to counsel, and to prevent a defendant from manipulating the mutual exclusivity of the rights to counsel and self-representation; "[i]n ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel..." Frazier-El, 204 F.3d at 559 (citations omitted). Unambiguity also avoids unnecessary conflicts in the ethical obligations of counsel. Singleton, 107 F.3d at 1102 ("As an officer of the court, the lawyer has obligations, including the duty of disclosure, the duty to ask only appropriate questions, and the duty not to suborn perjury, which have not been considered personally binding on the defendant. In addition, the lawyer's duty of attorney-client confidentiality could be seriously compromised by a system in which the defendant selectively employs his attorney while making his own defense.").

training or language abilities. See United States v. Betancourt-Arretuche, 933 F.2d 89, 95 (1st Cir. 1991) (neither lack of post-high school education or inability to speak English is "an insurmountable barrier to *pro se* representation"); United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) ("To suggest that an accused, who knows and appreciates what he is relinquishing and yet intelligently chooses to forego counsel and represent himself, must still have had some formal education or possess the ability to converse in English is . . . to misunderstand the thrust of Faretta and the constitutional *right* it recognized.") (emphasis in original). "[J]ust as it is the accused's right to plead guilty or *nolo contendere* to the charges against him, it is equally an accused's personal constitutional right to face the charges alone, either by standing mute and forcing the state to its proofs or by attempting to defend himself. The *only* condition on this right is that it be asserted by the accused with his 'eyes open.'" Id. (emphasis in original).

2. The Role of Standby Counsel and the Prohibition of Hybrid Counsel

At the heart of the defendant's Sixth Amendment right to represent himself is the right to conduct his defense as he sees fit, to "present his case in his own way." McKaskle, 465 U.S. at 177. "[H]e must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." Id. at 174. He also must be "able and willing to abide by rules of procedure and courtroom protocol." Id. at 173.

However, "the right to self representation is not absolute." Martinez, 528 U.S. at 161 (2000). Accord United States v. Akers, 215 F.3d 1089, 1097 (10th Cir. 2000), cert. denied, 531 U.S. 1023 (2000); Frazier-El, 204 F.3d at 559. Furthermore, while the Sixth Amendment protect's the individual defendant's right to self-representation, it must be remembered that "[a]

criminal trial is not a private matter." Mayberry v. Pennsylvania, 400 U.S. 455, 468 (1971) (Burger, C.J., concurring). As Chief Justice Burger observed: "the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself." Thus, while the Sixth Amendment right to self-representation is broad, the Supreme Court has held that a trial judge may appoint standby counsel for a *pro se* defendant, even over the defendant's objection, "to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals." McKaskle, 465 U.S. at 184; see also Faretta, 422 U.S. at 835 n.46.

To protect the public's interest in a fair trial, "the district court, in keeping with its broad supervisory powers, has . . . broad discretion to guide what, if any assistance standby, or advisory, counsel may provide to a defendant conducting his own defense." United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998). In exercising this discretion, the district court "may be required to make numerous rulings reconciling the participation of standby counsel with a *pro se* defendant's objection to that participation; nothing in the nature of the Faretta right suggests that the usual deference to 'judgment calls' on these issues by the trial judge should not obtain here as elsewhere." McKaskle, 465 U.S. at 177 n.8.

Consistent with this broad authority, the courts have upheld the appointment of standby counsel to conduct research on behalf of a *pro se* defendant, see Barham v. Powell, 895 F.2d 19, 23 (1st Cir. 1990), to assist with other substantive matters throughout trial, see McKaskle, 465 U.S. at 180 ("Counsel made motions, dictated proposed strategies into the record, registered objections to the prosecution's testimony, urged the summoning of additional witnesses, and

suggested questions that the defendant should have asked of witnesses."), and to be prepared to assume control of the defense in the event the *pro se* defendant's conduct was found to constitute a constructive waiver of the right of self-representation. See United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972).[12]

However, because "unsolicited and excessively intrusive participation by standby counsel" may undermine the right to self-representation, some limits on the extent of standby counsel's participation must be imposed. McKaskle, 465 U.S. at 177. The *pro se* defendant is entitled to preserve both actual control over the defense, as well as the appearance before the jury as one who is defending himself. Id. at 178. Accordingly, appointed standby counsel may actively assist the *pro se* defendant, but cannot interfere with defendant's control of the case. Standby counsel may express disagreement with the defendant's decisions, but must do so outside the jury's presence. Id. at 179.

Standby counsel is not prohibited, however, from acting in front of the jury. A defendant's rights are not violated "when standby counsel assists the *pro se* defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete," or "when counsel merely helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure." McKaskle, 465 U.S. at 183; see also United States v. Taylor, 569 F.2d 448, 453 (7th Cir. 1978) ("the court did not infringe [the defendant's]

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12. In Faretta, the Supreme Court cited Dougherty for the proposition that a trial judge could appoint standby counsel over the defendant's objection "to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." 422 U.S. at 834 n.46.

right to self-representation by appointing standby counsel and authorizing counsel over the accused's objections to participate in the trial in a manner that did not interfere with the accused's presentation of his own defense.").

A *pro se* defendant does not, however, have "a constitutional right to choreograph special appearances by counsel." McKaskle, 465 U.S. at 183. Once a defendant places standby counsel before the jury in an active and substantial role, or does not object when that happens, he could lose his right to represent himself. At a minimum, any further participation by counsel would be "presumed to be with the defendant's acquiescence." Id.

Finally, a *pro se* defendant does not have "a constitutional right to receive personal instruction from the trial judge on courtroom procedure." McKaskle, 465 U.S. at 183. Neither is the right of self-representation "a license to abuse the dignity of the courtroom," nor a license to violate the "relevant rules of procedural and substantive law." Faretta, 422 U.S. at 834 n.46. If the defendant "deliberately engages in serious and obstructionist misconduct," the court may terminate self-representation, and permit standby counsel to take over the defense. Id.

Although a defendant has a right to proceed *pro se* or to be represented by counsel, he has no absolute right to standby counsel, or to hybrid representation consisting of himself and standby counsel. See Faretta, 422 U.S. at 835; Lawrence, 161 F.3d at 253 (holding that court did not abuse its discretion by restricting assistance of standby counsel to procedural matters upon concluding that court was under no obligation to provide standby counsel); Singleton, 107 F.3d at 1100-03 (stating that hybrid representation is not independent Sixth Amendment right but within court's broad discretion, which court did not abuse when it imposed condition that defendant proceed without advisory counsel or hybrid representation, where

appointed counsel remained willing and able to proceed if defendant felt too insecure or incapable of proceeding alone); Julius v. Johnson, 755 F.2d 1403 (11th Cir. 1985) ("Faretta, does not hold that a defendant has a Sixth Amendment right to act as co-counsel, and we are not willing to extend the reach of the Sixth Amendment to include such a right.") (quoting United States v. Bowdach, 561 F.2d 1160, 1176 (5th Cir. 1977)). Nor does a defendant have the right to the assistance of unlicensed counsel. See Taylor, 569 F.2d at 451; United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976); United States v. Whitesel, 543 F.2d 1176, 1177-81 (6th Cir. 1976); United States v. Kelley, 539 F.2d 1199, 1201-03 (9th Cir. 1976).

3. Limits to and from the Right to Self-Representation

As noted earlier, the right to proceed *pro se* is not absolute; the "government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." Frazier-El, 204 F.3d at 559 (citation omitted). Thus, courts may terminate the right to self-representation if the defendant is not able or willing to abide by the rules of procedure or courtroom protocol. See McKaskle, 465 U.S. at 173; United States v. West, 877 F.2d 281, 287 (4th Cir. 1989) (court properly terminated *pro se* proceedings because defendant flouted responsibility to act as officer of court); Davis v. Morris, 719 F.2d 324 (9th Cir. 1983) (upholding trial court's decision to deny defendant's application to proceed *pro se* based, in part, on a desire to prevent the type of obstructive conduct engaged in by co-defendants); United States v. Dujanovich, 486 F.2d 182, 187 (9th Cir. 1973) ("actual" or "potential unruly" obstreperous activities "can well stand as a voluntary relinquishment or forfeiture of the limited constitutional right to proceed *pro se*, just as the trial court may take appropriate steps to quiet or remove obstreperous accused including binding and gagging, if

necessary . . . ."). Moreover, a defendant may not invoke his right to self-representation to delay the proceedings. See United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001) (request to represent self must not be made for purposes of delay, cert denied 122 S.Ct. 1309 (2002); Akers, 215 F.3d at 1097 ("The district court properly denies a request for self-representation where it finds the request was made to delay the trial."); Hamilton v. Groose, 28 F.3d 859, 862 (8th Cir. 1994) ("a defendant may not manipulate this right in order to delay or disrupt his trial"); United States v. Allen, 895 F.2d 1577, 1578 (2d Cir. 1990) (*pro se* defendant cannot play "cat and mouse" game with court) (quoting United States v. McMann, 386 F.2d 611, 618-19 (2d Cir. 1968)).

In addition, if a defendant elects to represent himself and waive the assistance of counsel, he gives up certain benefits associated with representation by counsel, including unfettered access to a law library and other resources. See, e.g., United States v. Byrd, 208 F.3d 592, 593 (7th Cir. 2000) (no Sixth Amendment violation when *pro se* defendant was denied access to legal materials); United States v. Taylor, 183 F.3d 1199, 1204 (10th Cir. 1999) (no Sixth Amendment violation when court refused to grant defendant access to law library because *pro se* defendants have no right to access law library materials and because court had appointed stand-by counsel, who could obtain legal materials for defendant and so was constitutionally acceptable alternative to access); Degrate v. Godwin, 84 F.3d 768, 769 (5th Cir. 1996) (per curiam) (defendant who waived right to counsel has no constitutional right to access prison law library to prepare *pro se* defense); United States v. Knox, 950 F.2d 516, 519-20 (8th Cir. 1991) (no Sixth Amendment violation where court denied defendant access to law library because defendant refused assistance of standby counsel); United States v. Sammons, 918 F.2d 592, 602

(6th Cir. 1990) (court's limitation of defendant's access to law library not improper because "by knowingly and intelligently waiving his right to counsel, the appellant also relinquished his access to a law library"); United States v. Robinson, 913 F.2d 712, 718 (9th Cir. 1990) ("There was no abuse of discretion in tailoring the access order to conform to the perceived needs of prison management."); see generally "Thirtieth Annual Review of Criminal Procedure," 89 Geo. L.J. 1045, 1497 n.1505 (2001) (collecting cases). As long as a defendant's "choice to proceed *pro se* [is] intelligently and voluntarily made with the knowledge that access to unlimited legal research facilities away from his place of detention would not be allowed due to his incarceration," there is no constitutional injury. United States v. Lane, 718 F.2d 226, 233 (7th Cir. 1983).

Finally, in limited circumstances, a court may limit a *pro se* defendant's ability to cross-examine certain victim witnesses, see Fields v. Murray, 49 F.3d 1024, 1035-37 (4th Cir. 1005 (en banc) (upholding authority of trial court to limit *pro se* defendant's cross-examination to protect child sex abuse victims from trauma), and the court is under no heightened obligation to assist a defendant who chooses to represent himself in a criminal case. See United States v. Barfield, 969 F.2d 1554, 1558 (4th Cir. 1992) (no Sixth Amendment violation when court failed to remind defendant of role of standby counsel during voir dire, because defendant waived assistance when he elected to proceed *pro se*). And, a *pro se* defendant cannot on appeal complain about the quality of his own defense. Faretta, 422 U.S. at 834 n.46.

4. Participation of Counsel at Faretta Hearing to Waive Right to Counsel

While some constitutional rights, like the right to self-representation, can be lost through the failure to invoke them, the Supreme Court has enforced the requirement that key trial

rights, such as the right to assistance of counsel, cannot be lost without a knowing and voluntary waiver. See Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). Because the right to counsel attaches at the initiation of adversarial judicial proceedings, See Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion), and failure to provide counsel results in automatic reversal, See Gideon, 372 U.S. at 339, 345, a defendant should be represented by counsel at all proceedings unless and until found competent to waive such counsel. In other words, the defendant should have counsel to represent him at the Faretta hearing. To allow waiver of counsel before determining competence to waive counsel could jeopardize the validity and constitutionality of all subsequent proceedings.

At hearings to determine competency to stand trial, for example, trial courts have refused to permit defendants to represent themselves. See, e.g., Frazier-El, 204 F.3d at 559 (holding that court's refusal to permit the defendant to represent himself until issue of competency to stand trial was determined was clearly justified); United States v. Purnett, 910 F.2d 51, 55 (2d Cir. 1990) (holding that trial court erred in permitting defendant to appear without counsel before his competency to stand trial was settled). The standard of competence for waiving counsel is identical to the standard of competence for standing trial. Frazier-El, 204 F.3d at 559 (citing Godinez v. Moran, 509 U.S. at 396-97).

Accordingly, for purposes of determining competency to waive counsel, the Court should assign counsel to represent the defendant, even if only on standby status. The Court could then allow a hybrid arrangement for the hearing, whereby assigned counsel would have full responsibility for representing the defendant, but the defendant would also be able to take an active role in the proceeding. Such an arrangement would enable the Court to assure

proper testing of evidence and airing of the issues, while at the same time giving the defendant the voice that he requests.

B. Applying The Right To Self-Representation To This Case

1. The Defendant's Knowing Waiver of his Right to Counsel – Notice of the Limits to Proceeding *Pro Se* in this Case

Faretta and its progeny require that a proper invocation of the right to self-representation be preceded by a knowing, intelligent and voluntary waiver of the defendant's right to counsel. Among other things, this requires that the defendant be advised of the particular pitfalls of forfeiting the benefits of counsel in his/her particular case. Thus, while there is no precise script that a court should follow in ascertaining whether a would-be *pro se* defendant understands the ramifications of his request to waive his right to counsel, see Singleton, 107 F.3d at 1099, there is a requirement that the defendant "appreciate[] the possible consequences of mishandling the[] core functions [a lawyer performs] and the lawyer's superior ability to handle them." United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994).

An important facet of making a knowing, intelligent, and voluntary waiver of the right to counsel is knowing the conditions under which a defendant will be permitted to represent himself. For example, in Singleton, the Fourth Circuit approved a district court's decision to condition a defendant's mid-trial request to proceed *pro se* on his commitment not to request a continuance in the trial and to proceed without the assistance of even standby counsel. 107 F.3d at 1099-1100. Similarly, the Seventh Circuit has held that a waiver of counsel is properly made when the defendant was advised that he would not be permitted unlimited access to legal research facilities away from the prison in which he was detained. United States v. Lane, 718 at

233 (7th Cir. 1983). Similarly, courts have even upheld the gagging, shackling, and removal of *pro se* defendants who were previously warned that any misconduct would result in such restraint and/or the forfeiture of their right to self-representation. See Illinois v. Allen, 397 U.S. 337 346 (1970) (trial court repeatedly warned defendant that misconduct would result in his removal); Stewart v. Corbin, 850 F.2d 492, 499 (9th Cir. 1988) ("It is to be noted that the judge had warned appellant that he would gag appellant if he violated the court's order . . .; therefore, "gagging was required," and the "interference with self-representation was a necessary one.").

There are a number of potential restrictions on the defendant's right to represent himself that may arise from the unique circumstances of this case. Most of these potential restrictions arise from the extraordinary security risks the defendant and *al Qaeda*, the organization with which he is associated, pose for the participants in the trial and for the nation as a whole.

As detailed at length in the Government's Memorandum in Opposition to the Defendant's Motion for Relief from Prison Conditions, dated April 17, 2002, *al Qaeda* has engaged in a declared war against United States civilians during the last several years. Adherents to *al Qaeda*, including, as alleged in the Indictment, the defendant, believe it is their duty to kill American civilians anywhere in the world they can be found.[13] To that end, *al Qaeda* has trained its followers in assassination techniques, the use of weapons, the use of codes to communicate messages, even from within prison, and has instructed them to continue the holy war (*jihad*) even

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13. Of course, the defendant made his own feelings towards the United States clear during the April 22nd Conference, where he declared: "I pray to Allah, the powerful, for ... the destruction of the United States of America." April 22 Tr. at 10.

after capture. Moreover, Usama Bin Laden, the undisputed leader of *al Qaeda*, has called for continued attacks against American targets to release "brothers" detained in American jails.

The record to date reveals the fears regarding *al Qaeda* are well-founded. For example, evidence introduced at the trial of *al Qaeda* adherents in the Southern District of New York demonstrates that *al Qaeda* closely monitors court proceedings involving its followers/sympathizers, and seeks to kill those who provide information to hostile government authorities. And, as the attack against Judge Sand reveals, *al Qaeda* members/associates are undeterred by fear of failure, injury or even death in their pursuit of *jihad* against United States citizens.

Thus, the trial of the defendant, while vital to securing justice for the thousands who have suffered at the hands of *al Qaeda*, presents unique security challenges. Aside from the risk of physical harm to the participants in the trial, the unnecessary disclosure of the information collected against *al Qaeda*, including the sources of that information and the methods used to collect it, could undermine national security interests. Not only is the law enforcement component of the Government continuing its investigation of *al Qaeda*, but other elements of the Government are pursuing other means of neutralizing *al Qaeda* members/associates around the world. Thus, it is vital to protect, as much as practical, the premature disclosure of information related to this case. See United States v. Bin Laden, 58 F. Supp.2d 113, 121 (S.D.N.Y. 1999) ("The concerns [of premature disclosure of classified information] are heightened in this case because the Government's investigation is ongoing, which increases the possibility that unauthorized disclosures might place additional lives in danger.").

To safeguard national security interests implicated by this case, the Government

has sought to implement several protective measures. First, the Government has requested, and the Court has issued, protective orders that strictly govern the dissemination of both classified and non-classified discovery. See Protective Orders dated January 22, 2002, and February 5, 2002. Among the provisions in the protective order governing classified information is the requirement that only those with a security clearance be given access to classified materials. This order specifies that defense counsel of record may receive classified discovery materials, and that the defendant may not absent the granting of a security clearance.[14]

Second, the Government also has imposed "Special Administrative Measures" ("SAM") against the defendant that strictly limit his contact with the outside world. For example, the defendant's telephone calls and mail are monitored, and his visitation privileges are highly restricted. All of these procedures are designed to prevent the defendant from passing on harmful messages to his cohorts elsewhere in the world. Such measures, while strict, are constitutional and amply supported by the information regarding *al Qaeda*'s threat to the country. See United States v. El-Hage, 213 F.3d 74, 81 (2d Cir.), cert. denied, 531 U.S. 881 (2000).

Although the protective orders and SAM offer a measure of protection to public

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14. One critical component of such a protective order is the perception of other governments and agencies that share sensitive information with our government that their interests will be protected. See Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); Bin Laden, 58 F. Supp.2d at 121 (stressing importance in preventing release of classified information). For these and other reasons, a protective order similar to the one issued by this Court has survived constitutional challenge. See United States v. Bin Laden, 2001 WL 66393 at *3 (S.D.N.Y. 2001).

safety, more may be required to protect both the dignity of the court proceedings in this case and the nation's security, particularly if the defendant continues in his quest to represent himself. In particular, if the defendant represents himself, the Government anticipates that it is likely to seek leave of the Court to: (1) continue to bar the defendant's access to classified and other highly sensitive material; (2) withhold the names and addresses of veniremen and the addresses of witness it may call in this case, as is permitted under 18 U.S.C. § 3432; (3) limit the defendant's access to research materials and closely scrutinize the defendant's access to visitors other than counsel of record; (4) adopt strict security measures during all court proceedings, including the trial, such as the use of stun belts or other physical restraints; (5) briefly delay the public filing of any submissions made by the defendant until they can be reviewed for harmful or coded messages, and to advise the defendant that he may not pass on any such messages during any court proceedings; (6) that the defendant not be permitted to cross-examine certain victim witnesses, and (7) that his participation in any depositions pursuant to Fed. R. Crim. P. 15, particularly of any foreign witnesses, be limited or that they be conducted by standby counsel.

These restrictions are lawful as they collectively promote compelling government interests. For example, limitations on the defendant's access to classified and other sensitive information, as well as identifying information about the venire and witnesses in this case, protect both valid national security and public safety interests, and are the type of restrictions which the courts routinely have upheld. See Smith v. Illinois, 390 U.S. 129, 131 (1968) (permitting Government to withhold witnesses' addresses); Roviaro v. United States, 353 U.S. 53, 59-62 (1957) (permissible to withhold informant's identity from defendant); Morgan v. Bennett, 204 F.3d 360, 367 (2d Cir. 2000) (upholding trial court's order that counsel not share

timing of witness' testimony with defendant-client), cert. denied, 531 U.S. 819 (2000); United States v. Thai, 29 F.3d 785, 800-01 (2d Cir. 1994) (upholding use of anonymous jury); United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989) (Government's interest in protecting details about methods used to intercept communications outweighed defendant's discovery rights); United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985) (Government has "substantial interest in protecting sensitive sources and methods of gathering information"); United States v. Truong, 667 F.2d 1105, 1107 (4th Cir. 1981) (no denial of Sixth Amendment right to counsel where defense counsel, and not defendant, permitted to examine documents preliminary to Jencks Act rulings); United States v. Pelton, 578 F.2d 701 (8th Cir. 1978) (affirming district court's decision to withhold tapes of defendant to protect identity of cooperating witness); United States v. Anderson, 509 F.2d 724, 730 (9th Cir. 1974) (access to *in camera* hearing only to defense counsel); Bin Laden, 2001 WL 66393 at *3-4 (upholding protective order barring defendant terrorists from reviewing classified materials in lieu of access to materials by cleared defense counsel); United States v. Rezaq, 156 F.R.D. 514, 525 (D.D.C. 1994), vacated in part on other grounds, United States v. Rezaq, 899 F. Supp. 697 (D.D.C. 1995) (upholding protective order barring classified information from defendant terrorist).

Similarly, the courts have upheld the use of physical restraints to *prevent* contumacious defendants, including those representing themselves, from harming participants in a trial or from otherwise impugning the integrity of court proceedings. See Illinois v. Allen, 397 U.S. at 343 (*pro se* defendant forfeits Sixth Amendment right to confront witnesses by virtue of his own unlawful conduct); Fountain v. United States, 211 F.3d 429, 436 (7th Cir. 2000) ("it is well established that a defendant may be shackled in the presence of a jury upon a showing of

'extreme need.'") Woods v. Thieret, 5 F.3d 244, 249 (7th Cir. 1993) (noting several factors supporting restraints, including "the long route through the courtroom []placing the inmates in close proximity to the bench, counsel tables and jurors[], [and] the number of inmates moving through the court"); Lemons v. Skidmore, 985 F.2d 354, 358 (7th Cir. 1993); Stewart, 850 F.2d at 500 (rejecting Faretta claim by *pro se* defendant who was gagged and shackled, after warnings from court).

Moreover, the Fourth Circuit has approved limits on a *pro se* defendant's right to cross-examine certain victim witnesses, Fields, 49 F.3d at 1037 (upholding district court's finding that preventing cross-examination of child sex abuse victim by *pro se* defendant "was necessary to further the State's important interest in protecting child sexual abuse victims from further trauma"), and other courts have limited a *pro se* defendant's right to be transported to another facility to obtain access to materials in preparation of his defense. See Lane, 718 F.2d at 232 ("The court was obviously cognizant of the fact that requiring prison officials to accompany inmates to legal research facilities outside of the jail would give rise to a multitude of security problems and to manpower deficiencies."). Thus, there may be room for comparable restrictions on the defendant's ability to cross-examine victim witnesses in this case, or other witnesses whose unavailability in the United States may require a Rule 15 deposition, as well as limits to his access to research materials and outside visitors.

Finally, there is ample legal authority for other restrictions aimed at limiting the defendant's ability to use his status as a *pro se* defendant to commit or solicit further terrorist acts. As Justice Douglas observed: "A courtroom is a hallowed place where trials must proceed with dignity and not become occasions for entertainment by the participants, by extraneous

persons, by modern mass media, or otherwise." Illinois v. Allen, 397 U.S. at 351 (Douglas, J., concurring). Thus, "in the exercise of their supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress," to, among other things, "deter illegal conduct." United States v. Hasting, 461 U.S. 499, 505 (1983). In the context of this case, therefore, the Government may ask the Court to exercise its authority to permit Government review of any submissions filed by the defendant before being publicly filed, or to otherwise bar the defendant from soliciting or promoting acts of violence. While the defendant, acting as his own counsel, should be given broad latitude to advocate his case, he has no constitutional right to convert advocacy into criminal conduct. See United States v. Abdel Rahman, 189 F.3d 88, 117 (2d Cir.) ("Notwithstanding that political speech and religious exercise are among the activities most jealously guarded by the First Amendment, one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching."), cf. Halpern v. Kissinger, 807 F.2d 180, 187 (D.C. Cir. 1986) ("The concept of a special rule for national security matters is no stranger to court-made law – from reduced due process requirements, to increased ability to impinge upon interests protected by the first amendment, to authority (where foreign powers are involved) to conduct warrantless searches.") (omitting citations) (parentheses in original).

Thus, while the Government submits that it will be on solid legal ground to request these limitations should the need arise, the Government is not seeking the above-listed relief from the Court at this time. Yet, in an abundance of caution, the Government submits that the defendant be advised that the exercise of his Faretta rights in this case may be circumscribed should the Court impose any of these restrictions on his qualified right to self-representation.

Furthermore, the Government requests that the defendant be advised that he will not be granted any continuances of the trial by virtue of his self-representation, see Singleton, 107 F.3d at 1099, and that *any* obstreperous, violent, or unlawful conduct will result in the automatic forfeiture of his right to self-representation (and potentially more restrictive physical restraints) and that standby counsel would immediately assume representation of defendant. See Illinois v. Allen, 397 U.S. at 346 (*pro se* defendant had no Sixth Amendment claim from his removal during trial for obstructive behavior given repeated warnings of consequences of unruly conduct); West, 877 F.2d at 286 (*pro se* defendant deemed to have waived his status for comments made during opening statement that the court had specifically warned defendant not to make); Dougherty, 473 F.2d at 1125 ("a potentially unruly defendant may and should be clearly forewarned that deliberate dilatory or obstructive behavior may operate in effect as a waiver of his *pro se* rights and, in that event, amicus will be ready to assume exclusive control of the defense").

"While the Constitution protects against invasions of individuals rights," such as the right of self-representation, "it is not a suicide pact." Haig v. Agee, 453 U.S. 280, 309-10 (1981) (citation omitted). The fundamental principle of self-preservation necessarily demands that some reasonable and well-defined boundaries may be placed on the defendant's ability to represent himself in this case, cf. United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurther, J., concurring) ("The right of a government to maintain its existence – self-preservation – is the most pervasive aspect of sovereignty."), and that he be advised of these lawful limits before he waives the right to counsel with his eyes wide open. United States v. McDowell, 814 F.2d at 250; McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir. 1985) ("the court must ensure that the waiver is not the result of coercion or mistreatment of the defendant,

and must be satisfied that the accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right that he is waiving.") (omitting citations); Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984) ("Once there is a clear assertion of that right [self-representation], the court must conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of proceeding without counsel.").

2. The Role of Standby Counsel in this Case

The defendant's right to self-representation "exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." McKaskle, 465 U.S. at 176-77. However, "[b]oth of these objectives can be achieved without categorically silencing standby counsel." Id. at 177. Indeed, "Faretta itself dealt with the defendant's affirmative right to participate, not with the limits on standby counsel's additional involvement." Id. As long as standby counsel does not adversely affect the *pro se* defendant's control over the case he presents to the jury, which the Supreme Court has labeled the "core of the Faretta right," there is no constitutional foul. Id. at 178. Thus, for example, "Faretta rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel." Id. at 179. Under such an arrangement, standby counsel may make motions and dictate defense strategies into the record, id. at 180, "even in the unlikely event that [standby counsel's participation] somewhat undermines the *pro se* defendant's appearance of control over his own defense." Id. at 184.

Given these guidelines from the Supreme Court, and under the Court's broad authority in this area, and if defendant exercises his Faretta right, the Court should appoint Messrs. Dunham, Zerkin and MacMahon as standby counsel to continue in this case. At a minimum, standby counsel could serve three functions. First, standby counsel can continue to review the discovery materials with which counsel is most familiar. In particular, standby counsel could review the classified materials and make appropriate motions under the Classified Information Procedures Act (CIPA). See 18 U.S.C. App. 3. In this capacity, there would be no violation of the defendant's Faretta right as standby counsel's participation in CIPA proceedings would, by definition, not compromise the defendant's preeminence in front of the jury. Indeed, there is ample authority to *exclude* defendant from any CIPA proceedings, or other pre-trial proceedings where the issue to be resolved is "not directly related to the subject matter of the trial." Bin Laden, 2001 WL 66393 at *6 (upholding exclusion of defendant from CIPA hearings in lieu of counsel); see also Kentucky v. Stincer, 482 U.S. 730, 740 (approving exclusion of defendant from competency hearing attended by counsel); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261-62 (9th Cir. 1998) (permissible to exclude defendant from CIPA hearing because only questions of law to be resolved); United States v. Bell, 464 F.2d 667, 670 (2d Cir. 1972) (excluding defendant during testimony describing "air hijacker profile").

Second, standby counsel could be prepared to conduct the trial should the Court find that the defendant constructively waived his right to self-representation by his own unruly conduct. See Faretta, 422 U.S. at 834 n.46 (standby counsel should be appointed "to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."); Stewart, 850 F.2d at 499 ("After appellant was gagged he obviously could not

represent himself. It was then necessary to have the advisory counsel . . . step in as counsel of record."). In addition to continuity, appointing standby counsel at this stage also ensures a timely and seamless continuation of the trial schedule set by the Court. See West, 877 F.2d at 287 ("The district court warned Mills prior to his opening statement that improper conduct would result in his removal as pro se counsel and replacement by standby counsel. The prospect of immediately going forward with standby counsel was thus a risk Mills knowingly accepted, and indeed flouted, when he made his inflammatory remarks. The need for some limit to a defendant's ability to manipulate the judicial system, justified the district court's denial of his subsequent motion to continue.").

Third, in a more limited capacity, standby counsel would be available to conduct the cross-examination of any witnesses the Court determines the defendant should not be permitted to question. See Fields, supra. For example, to the extent there is sufficient reason to believe that the cross-examination of a victim-witness by the defendant would cause undue trauma, the Court could appoint standby counsel to conduct the examination of that witness. Similarly, if the need arises to take a deposition of a witness abroad, and there is insufficient means to conduct that deposition using video conference capability, standby counsel may then be designated to conduct the deposition.[15] While cross-examination of certain witnesses by standby counsel would "inhibit [Moussaoui's] dignity and autonomy to some degree by affecting 'the jury's perception that [he was] representing himself,'" the Faretta right would survive the isolated participation of standby counsel as Moussaoui "would have conducted every other

15. There would be overwhelming security reasons not to transport the defendant to a foreign country to conduct such a deposition, thus limiting the extent of his participation to a video conference.

portion of the trial," thereby preserving his "dignity and autonomy." Id. at 1035 (quoting McKaskle, 465 U.S. at 178). This would particularly hold true were the defendant permitted to supply cross-examination questions to standby counsel.

In sum, although not constitutionally mandated, the assistance of standby counsel would greatly benefit these proceedings. Standby counsel should actively support the defendant by investigating the facts and the law, reviewing classified discovery and filing motions related to these materials, providing the defendant with legal materials, identifying possible defenses, and suggesting steps to be taken by the defendant. Standby counsel would also be available to try the case, if called upon by circumstances created by the defendant, or to participate in the cross-examination of certain witnesses.

Respectfully Submitted,

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United States Attorney

By: /s/
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GENERAL ADVICE TO THE DEFENDANT

You have the right to counsel; that is, you have a right to have a lawyer represent you in these proceedings and at your trial. You may waive your right to counsel and represent yourself, but only if you meet certain requirements. In particular, if you want to represent yourself, you must make a request to do so that is (1) clear and unequivocal, and not for purposes of delay or manipulation; (2) knowing, intelligent and voluntary; and (3) timely.[1]

First, if you want to represent yourself, you must say so clearly and unequivocally.[2] If you do not make it clear that you want to represent yourself, then you will be represented by a lawyer. There is, in other words, a presumption that you will be represented by a lawyer;[3] the only way to overcome that presumption is if you express your contrary desire clearly. Let me reiterate that absolutely critical point for you: If you want to represent yourself, you must say so clearly, explicitly, and without qualification or reservation. If you do not do that, then you will be represented by a lawyer, either retained or appointed.

Second, your request for self-representation must be knowing, intelligent and voluntary. In other words, before you decide what you want to do, you must understand the consequences of your decision. I want you to know what is at stake here. Although you need not be a lawyer, or have the skill and experience of a lawyer, in order to decide to represent yourself, you should be aware of the dangers and disadvantages of proceeding without one. You must know what you are doing and make your choice with your eyes open.[4]

I will now try to explain to you the difficulties and dangers of self-representation. If I say something that you do not understand, please let me know, and I will try to explain it again. It is vitally important that you understand the choice you are going to be making, and I will do everything I can to help you understand the choices.

You are facing very serious charges including: (1) conspiracy to commit acts of terrorism transcending national boundaries; (2) conspiracy to commit aircraft piracy; (3)

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1. See United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000), cert. denied. 531 U.S. 994 121 S.Ct. 487 (2000)

2. See Frazier-El, 204 F.3d at 558.

3. See United States v. Singleton, 107 F.3d 1091, 1096 (4th Cir. 1997).

4. See Singleton, 107 F.3d at 1098.

conspiracy to destroy aircraft; (4) conspiracy to use weapons of mass destruction; (5) conspiracy to murder United States employees; and (6) conspiracy to destroy property. These charges carry very severe penalties including the possibility, if you are convicted, of death. And if death is not imposed and you are convicted of the charges in the indictment, then you will be sentenced to life imprisonment without the possibility of parole. In the federal system there is no more parole. I will later go over the specific charges that you face in some detail, but at this point I simply want to advise you that these charges are legally and factually complex and that, due to the possible imposition of the death penalty, the trial proceedings will be procedurally complex, potentially comprising two phases, a guilt phase and a penalty phase.

Defending against these charges will require significant legal work, and require familiarity with the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the death penalty statute. In the guilt phase of the trial, defending against these charges will require, for example, filing legal motions, such as motions to suppress evidence; examining potential jurors to ensure that they will be fair and impartial in deciding your case; making objections during the course of the trial, such as an objection to hearsay or other inadmissible types of evidence; cross-examining witnesses called by the government to test their perception or memory of events, their motives or possible bias, and the truthfulness of their testimony; calling witnesses for the defense and eliciting from them evidence that is favorable to your case; moving tangible objects such as documents into evidence, which can be a technical process under the rules of evidence that govern in this Court; writing legally precise jury instructions that correctly state the law as it applies to the facts of your case, and that allow the jury to consider possible legal defenses to the charges that the government is bringing against you; and making an opening statement and closing argument to the jury that summarizes the evidence and argues, under the applicable law, for an acquittal.

If the jury finds you guilty of any of the capital charges, defending against imposition of the death penalty will require additional legal work, including the filing of your list of mitigating factors you may seek to offer to avoid a death sentence, the discovery and presentation of evidence in mitigation of the offenses of conviction, and again the preparation of legally precise jury instructions regarding the application of the law of capital punishment to this case.

All these things are usually better done by a lawyer than a lay person, because the lawyer is specially trained to do them and has special knowledge of, and experience with, the substantive and procedural rules of law and of this Court. Obviously, there will be serious consequences if your defense is mishandled here. Moreover, because you are now in jail, your lawyers may have better and easier access to witnesses who may be of help to you. And I must advise you that you do not have a constitutional right to access toa law library; legal materials would only be made available to you through standby counsel and the Court. Furthermore,

because of the Special Administrative Measures imposed on you by prison officials, you will not have unlimited access to legal research materials or to telephones. Nor will you have unlimited access to visitors, other than your counsel. You will also not be allowed to travel to any locations outside any prison in which you are held or the courtroom to conduct the examination of any witnesses.

In addition, you will not be given access to classified materials as you do not have the proper security clearance to review such items. Nor will you be given access to other sensitive documents I find the disclosure of which would jeopardize public safety. However, as I will discuss in greater detail in a few minutes, I will appoint what is known as "standby counsel," who have the necessary security clearance to review classified materials. These counsel may then make any legal motions regarding the classified materials, subject to your approval.

It is almost always a good idea for a defendant in a criminal case to have a lawyer. I do not, however, want you to take these warnings or anything else I am saying as any kind of veiled threat, or as a suggestion that I will be disposed against you if you decide to represent yourself. The choice is entirely yours, so long as you make it in a knowing, intelligent and voluntary fashion, with a proper understanding of what is at stake. I am only trying to ensure that you make an informed decision.

Third and finally, timeliness:[5] If you make your choice today, it will be timely, because it will not require us to reschedule the trial. But I warn you, for the future, that you do not have a right to manipulate this Court. You should think hard before making a decision today, because it will have ongoing significance for you. If you choose today to have a lawyer, and then later ask to represent yourself, and if I conclude that you are acting in bad faith and trying to delay the trial, I may deny your request.[6] This is an important moment in the case, and we are holding this hearing because you have an important decision to make. You should make a thoughtful and considered choice that you can live with until the trial is over.

If you decide to represent yourself, I will appoint what is called "standby" counsel to assist you. You will still largely control the presentation of your case, but you will have lawyers to explain to you the details of courtroom protocol and the rules of evidence and procedure. The standby lawyers will be there to help you during the pretrial stage to investigate the facts and the law, identify possible defenses, and suggest appropriate motions to file. During

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5. See Frazier-El, 204 F.3d at 556 (citing United States v. Lawrence, 605 F.2d 1321, 1324-1325 n.2 (4th Cir. 1979)).

6. See Frazier-El, 204 F.3d at 572.

the trial, they will be there to provide help in introducing evidence and objecting to testimony, and will be available to take over if I find that for some reason you have lost your right to self-representation. During the sentencing phase, standby counsel will assist you in presenting mitigating evidence. Standby counsel are there to assist, but will not be permitted to interfere with your control of the case, with a few exceptions I will discuss shortly.

You do not have a right to reject these standby lawyers, and as I say, I have decided to appoint them for you if you decide to proceed *pro se*.[7] So, if you represent yourself, you will have standby counsel.

However, even with standby counsel, you will still largely control the presentation of your case to the jury. For example, you will have a right to control the organization and content of your own defense, to make motions, to argue points of law, to participate in voir dire, to question most witnesses, and to address the Court and the jury at appropriate points in the trial. Standby counsel may not interfere with your control of the case or your appearance of control before the jury. They may express disagreement with your decisions, but must do so outside the jury's presence. You ultimately retain final authority over the case.[8] Of course, you will have to do all of these things within the limits set by the rules of courtroom procedure, evidence, and decorum.[9] For example, I may decide that neither you nor the government lawyers will learn the identities of the group of people from which the jury will be selected in this case, nor will you learn other personal identifying information, such as the addresses, of the government's witnesses.

This is not to say, however, that standby counsel is prohibited from acting at all in front of the jury. They may assist you in overcoming routine procedural or evidentiary obstacles, such as introducing evidence or objecting to testimony, and may help to ensure your compliance with basic rules of courtroom protocol and procedure.[10] Also, if I find that there are reasons why you should not be allowed to cross-examine certain witnesses, because of particularly sensitivities on their part, then I will direct standby counsel, with your input, to conduct the cross-examination of such witnesses. Similarly, I may direct standby counsel to conduct the

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7. See McKaskle v. Wiggins, 465 U.S. 168, 184 (1984); Faretta v. California, 422 U.S. 806, 835 n.46 (1975).

8. See McKaskle, 465 U.S. at 178.

9. See McKaskle, 465 U.S. at 173.

10. See McKaskle, 465 U.S. at 183.

examination, again with your input, of a witness who must be questioned from a location outside the immediate area or even outside the country, because you will not be allowed to partake in any travel outside of the facility in which you are detained or this courthouse.

To sum up, then, you have a right to be represented by a lawyer, and you have a right to represent yourself. You do not, however, have a right to "hybrid" representation, where you and a lawyer act as co-counsel in the conduct of your defense.[11]

If you do not waive your right to counsel and you are represented by a lawyer, then the lawyer will conduct your defense: you will not be permitted to examine witnesses, offer evidence, address me or the jury directly, participate in conferences here at the bench, or perform any of the attorney's "core functions" in the courtroom. You will, of course, be permitted to remain in the courtroom during your trial - provided as always that you maintain proper decorum. And I would encourage you to work behind the scenes with your attorneys, to help them represent you as well as possible. But if you are represented by a lawyer, you will not function as an advocate in the trial. Your only public speaking role would arise if you decided to testify, in which case you would answer the specific questions posed by your lawyers and by the attorneys for the government. To repeat: If you are represented by lawyers, then it is the lawyers, and not you, who will conduct the defense.

Correspondingly, if you represent yourself, you will be able to perform the lawyer's core functions, but you will not necessarily be allowed to direct special appearances by counsel when it is convenient for you.[12] Standby counsel will be available to help you overcome routine procedural or evidentiary obstacles, and matters of courtroom protocol, again without undermining your actual control over the presentation of your defense.[13] But if you elect to place standby counsel before the jury in an active role, or if you do not object when that happens, you could lose your right to represent yourself. At a minimum, if you do that, any further participation by the lawyer will be presumed to be with your permission, and you will not be able to complain about it later.[14]

If you represent yourself, I am not going to treat you any differently than any

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11. See McKaskle, 465 U.S. at 183; Singleton, 107 F.3d at 1100-03.

12. See McKaskle, 465 U.S. at 183.

13. See McKaskle, 465 U.S. at 183.

14. See McKaskle, 465 U.S. at 183.

other defendant,[15] and the court of appeals is not going to treat your case any differently.[16] If you make the decision to represent yourself and you make mistakes, you are not going to be able to come back and complain about those mistakes. You will have accepted responsibility for them.

There are some other things you should know. If you do choose to represent yourself, you must understand that it does not give you a license to abuse the dignity of the courtroom, or a license to violate the relevant rules of procedural and substantive law. You must always abide by courtroom protocol and maintain proper decorum, and you may not improperly disrupt the proceedings. You must, for example, follow the rules of evidence. You must obey my rulings even if you disagree with them, knowing that you have preserved your objection for review by the appellate court. If you deliberately engage in serious and obstructionist misconduct, I will terminate your self-representation and I may also impose physical restraints on you, such as shackles, or remove you entirely from the courtroom during the trial, until you commit to conducting yourself in a manner consistent with the dignity of these court proceedings. If I am forced to do so, then standby counsel will take over the defense for you.[17] Also, you should know that I may decide to permit the United States Marshals to adopt certain security procedures to protect the dignity and safety of this courtroom. These procedures may involve certain physical restraints, such as shackles or stun belts. Of course, I would only approve of such procedures after having a hearing at which you and your counsel may be present and after satisfying myself that any restraints imposed on you would not jeopardize your right to a fair trial.

If you would like a moment now to consult with counsel, or to think about your decision, I will pause the proceedings so you may do so. This case has been certified as a death penalty case and that puts it in a very, very serious posture from your standpoint. The rules and the procedures are somewhat different, and they are more complicated with a death penalty case, and therefore, I want to make sure that you have very carefully thought through your position about representing yourself, and that you have discussed it with appointed counsel. If you have any questions, I will be happy to answer them at this time.

In a moment, I will ask you questions so that I can learn a little more about your background, education, job experience, knowledge of English and familiarity with the American legal system to determine whether your decision today is made knowingly and voluntarily. I will

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15. See McKaskle, 465 U.S. at 183-84.

16. See Faretta, 422 U.S. at 834 n.46.

17. See Faretta, 422 U.S. at 834 n.46.

also inquire about any recent or regular use of alcohol, narcotics, or prescription medications to assure myself that your judgment today is not clouded. I will then hear your decision and make my own determination and findings about whether you have knowingly, intelligently, voluntarily and unequivocally waived your right to counsel.

OUTLINE FOR COLLOQUY

A. Establishing Defendant's Background and Knowledge

After the advice described in Part I is given, the following information should be established during a colloquy with the defendant to determine whether the defendant knowingly, intelligently and voluntarily forgoes "the traditional benefits associated with the right to counsel," Faretta, 422 U.S. at 835; and that "he is able and willing to abide by rules of procedure and courtroom protocol," McKaskle, 465 U.S. at 173-74.[1]

*	Birth:	place and date of birth, age, nationality/citizenship, where raised;
*	Education:	where, level attained, ever study law;
*	Work:	experience;
*	Language:	which is native language, other languages spoken, if fluent in English, how long spoken English, where and how learned English, work experience with English as the primary language;
*	Consult:	able to communicate with attorneys in English, knowledge of legal terminology in English;
*	Legal System:	familiarity with U.S. system, ever study any U.S. law, ever been a party or witness in a U.S. legal proceeding, ever represent self or another in any U.S. legal proceeding, familiarity with the Federal Rules of Evidence, the Federal Rules of Criminal Procedure, the federal death penalty statute;
*	Civil Law:	aware that U.S. is common law system with very little in common with French civil law system, or with Islamic law; aware that U.S. system relies heavily on live witness testimony before jury and only to a limited degree on written witness statements;
*	Capital:	aware that if convicted possible sentences include death or life without parole, that no parole in federal system, that trial will be bifurcated into guilty and penalty phases, understand what aggravating and mitigating factors mean;
*	CIPA:	law that governs use of classified materials;

1. The parallels between the decision to plead guilty and the decision to represent oneself are apparent, and therefore require similar inquiries by the Court to determine that rights are knowingly, intelligently, voluntarily and unequivocally waived. See United States v. Boyd, 86 F.3d 719, 723-24 (7th Cir. 1996). Accordingly, the inquiry here is based in part on Boykin v. Alabama, 395 U.S. 238, 242-43 (1969); Brady v. United States, 397 U.S. 742, 755 (1970); and Fed. R. Crim. P. 11(d).

* Health: physical, mental, medication, treatment, counseling, hospitalization;
* Alcohol/Drugs: recent or current use;
* Threat/Promises: threats from or promises to anyone to influence decision;
* Offenses: understand nature of each charge, maximum penalties, elements of a conspiracy.

B. Confirmation of the Advice Given in Part I

After the inquiry outlined above is completed, a review of the advice previously given in Part I of the Addendum would establish on the record that the defendant understands the following:

* he has a right to counsel
* he has a right to represent himself, but only if he can establish a knowing, intelligent, voluntary and timely waiver of the right to counsel
* if he wants to represent himself, he must say so clearly and unequivocally, and that if he does not do so, he will be represented by counsel
* that he is facing very serious charges with complex factual bases and legal defenses, and serious penalties including the possibility of death or life without parole
* if he makes a decision today it will be timely, but that later requests to change his status may be denied as untimely.

In particular, the Court should specifically identify the charges; their factual bases; the statutory maximum and minimum penalties.

After the charges against the defendant are reviewed, the colloquy should continue in order to establish on the record that the defendant understands the following:

* that a lawyer is generally better at defending against such charges not only because the charges and possible defenses are legally and factually complex, but also because the methods for presenting a defense are limited by rules of courtroom procedure and evidence, which must be obeyed at all times by all parties, whether represented by a lawyer or not, and that the Court will not make a special exception for a pro se defendant
* that the choice in this matter is entirely the defendant's, and that the Court will not be biased against him no matter what he chooses
* that if he decides to represent himself, the defendant will have standby counsel appointed, and that he has no choice in that matter, but that even with standby

counsel he will still largely control the presentation of his case

* that if he is represented by a lawyer, then the lawyer, and not the defendant, will conduct the defense, and the defendant will not be permitted to function as an advocate in the courtroom
* that if the defendant represents himself, he does not have the right to direct special appearances by counsel, and that if counsel appears before the jury in an active role it may result in a waiver of the defendant's right to self-representation
* that if the defendant represents himself and elects to testify, he must present testimony by asking questions of himself, that he cannot just tell his story in narrative fashion
* that whether he represents himself or is represented by counsel, the defendant must obey all rules of courtroom evidence, procedure, and decorum, and that if he deliberately engages in serious obstructionist misconduct, his right of self-representation will be terminated, and he will if necessary be removed from the courtroom
* that if the defendant represents himself, he will not be permitted to review classified documents, or other documents that the Court may find for public safety reasons he may not see, and that standby counsel would review these materials and consult with the defendant about the filing of any motions based on their review
* that if the defendant represents himself, there may be limits to his access to legal research materials and to visitors, as well as to his use of the telephones and mail system in the detention facility where he is housed
* that if the defendant represents himself, standby counsel may nonetheless be asked to cross-examine certain victim-witnesses, or to cross-examine other witnesses who are unable to testify in the coutroom
* that if the defendant represents himself, he may be subject to physical restraints in the coutroom

Finally, after conducting the colloquy and establishing the defendant's answers on the record, the Court should expressly and directly ask the defendant whether he wants to represent himself, whether he feels that he is able to adequately represent himself, and whether he is making that decision of his own free will, with his eyes open, and voluntarily. The Court should then make explicit findings on the record as to whether the defendant has made an unequivocal waiver of the right to counsel, and whether the waiver is knowing, voluntary and intelligent.

GUIDELINE FOR DISTRICT JUDGES

"Guideline For District Judges," from 1 Bench Book for United States District Judges 1.02-2 to 1.02-5 (3d ed. 1986), in United States v. McDowell, 814 F.2d 245, 251-52 (6th Cir. 1987)

When a defendant states that he wishes to represent himself, you should ask questions similar to the following:

(a) Have you ever studied law?

(b) Have you ever represented yourself or any other defendant in a criminal action?

(c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)

(d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court must impose an assessment of at least $100 ($25 if a misdemeanor) and could sentence you to as much as __ years in prison and fine you as much as $__? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)

(e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?

(f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.

(g) Are you familiar with the Federal Rules of Evidence?

(h) You realize, do you not, that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?

(i) Are you familiar with the Federal Rules of Criminal Procedure?

(j) You realize, do you not, that those rules govern the way in which a criminal action is tried in federal court?

(k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

(l) (Then say to the defendant something to this effect): I must advise you that in my

opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.

(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, [and in your opinion the waiver of counsel is knowing and voluntary,] you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.

CERTIFICATE OF SERVICE

I certify that on June7, 2002, a copy of the attached Memorandum on the Government's Position on Competency and the Right of Self Representation and Addendum were sent via Overnight Delivery and facsimile to defense counsel below:

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